




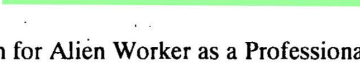
**U.S. Citizenship
and Immigration
Services**

(b)(6)



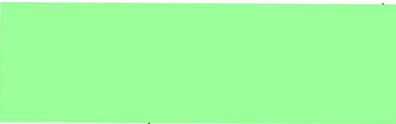
Date: FEB 12 2013 Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (NSC), denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 22, 2010, the AAO dismissed the appeal. Counsel to the petitioner subsequently filed a motion to reopen or reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5, and, on June 18, 2012, the AAO dismissed the motion as untimely filed pursuant to 8 C.F.R. § 103.5(a)(1)(i). The matter is now before the AAO as a motion to reconsider. The motion will be dismissed.

The petitioner is a software consulting business. It seeks to employ the beneficiary permanently in the United States as a senior system analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (DOL).

The director determined that the petitioner failed to demonstrate that the beneficiary has a master's degree or foreign equivalent degree as required by the labor certification. The director denied the petition accordingly on January 31, 2008.

The petitioner subsequently filed a timely appeal on March 3, 2008.

On September 22, 2010, the AAO dismissed the petitioner's appeal upholding the director's decision to deny the petition. The reasons for the dismissal of the appeal are set forth in the AAO's decision.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen or reconsider be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. 8 C.F.R. § 103.5(a)(1)(i). In this matter, the record reflects that the AAO's decision dated September 22, 2010, was mailed to both the petitioner at its business address and to its counsel of record with correct and proper instructions regarding the filing of motions to the AAO's dismissal of the appeal. However, contrary to the AAO's specific instruction that "[A]ll motions must be submitted to the office that originally decided your case" on the cover page of the decision issued on September 22, 2010, counsel submitted the motion directly to the AAO rather than the NSC. The AAO returned the motion to counsel on October 25, 2010, and once again specifically informed counsel that any motion to the AAO's prior dismissal of the appeal must be filed with the USCIS office that originally decided the case. Counsel subsequently filed the motion with the NSC on October 28, 2010, 36 days after the AAO dismissed the appeal. As the record did not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the AAO dismissed the motion for that reason on June 18, 2012.

Counsel subsequently filed a motion to reconsider in accordance with 8 C.F.R. § 103.5 on July 12, 2012. On motion, counsel indicates that the motion dismissed by the AAO as untimely filed on June 18, 2012, was actually timely filed with USCIS when it was initially received by the AAO on October 22, 2010. Counsel notes that the regulation at 8 C.F.R. § 103.2(a)(7) states that an application or petition received in a USCIS office shall be stamped to show the time and date of

actual receipt and shall be regarded as properly filed when so stamped. However, this regulation has since been amended to classify applications and petitions as "benefits requests," and nevertheless, does not apply to motions as the regulations at 8 C.F.R. § 103.5 specifically apply to motions. In addition, the amended regulation at 8 C.F.R. § 103.2(a)(6) specifies that "[a]ll benefit requests must be filed in accordance with the form instructions." More importantly, the AAO would not be the proper and correct USCIS office with which to file any application, petition, appeal, or motion, as the AAO is a USCIS office that does not accept fees. Therefore, it cannot be concluded that the previous motion had been properly filed at the correct USCIS office when it was initially received by the AAO.

As discussed above, the record reflects that the cover page of AAO's decision dated September 22, 2010 contained correct and proper instructions regarding the filing of motions. Rather than following these instructions by submitting the motion to the office that originally decided the case, the NSC, counsel submitted the motion directly to the AAO. Counsel has not demonstrated that the resultant delay was reasonable and was beyond the affected party's control.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.